NO. 167

In the Supreme Court of the United States

OCTOBER TERM, 1952.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

JOSEPH KAHRIGER.

Appeal from the United States District Court for the Eastern District of Pennsylvania.

STATEMENT AS TO JURISDICTION.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 16672 Criminal

(Filed Jun. 5, 1952)

UNITED STATES OF AMERICA

v.

JOSEPH KAHRIGER

Appeal from the United States District Court for the Eastern District of Pennsylvania.

STATEMENT AS TO JURISDICTION.

In Compliance with Rule 37(a)(1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the information.

OPINION BELOW

The opinion of the District Court dismissing the information has not been reported. A copy of the opinion is attached hereto as an Appendix.

JURISDICTION

The order of the District Court dismissing the information was entered on May 7, 1952. The jurisdiction of the Supreme Court to review on direct appeal the judgment of the District Court dismissing an information where the decision is based upon the invalidity of the statute upon which the information was founded, is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P. The following decisions sustain the jurisdiction of the Supreme Court: *United States* v. *Doremus*, 249 U.S. 86, *United States* v. *Sanchez*, 340 U.S. 42.

QUESTION PRESENTED

Whether the occupational tax provisions of the Revenue Act of 1951, which levy a tax on persons engaged in the business of accepting wagers, and require such persons to register with the collector of internal revenue, are unconstitutional because of incidental regulatory features of the registration section (26 U.S.C. 3291).

STATUTES INVOLVED

Section 471(a) of the Revenue Act of 1951 (c. 521, Title IV, 65 Stat. 529), provides, *inter alia*:

(26 U.S.C. 3290):

> A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.[1]

[1] 26 U.S.C. 3285(d) and (e) under subchapter A define the persons liable for payment of the tax as follows:

(26 U.S.C. 3291):

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

(26 U.S.C. 3294):

(a) *Failure to pay tax.* Any person who does any act which makes him liable for special tax

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"(d) *Persons liable for tax.* Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

"(e) *Exclusion from tax.* No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin operated device with respect to which an occupational tax is imposed by section 3267."

under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

(b) *Failure to post or exhibit stamp.* Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.

(c) *Willful violations.* The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

STATEMENT

On March 17, 1952, a two-count information was filed in the United States District Court for the Eastern District of Pennsylvania charging that defendant, being in the business of accepting wagers, as defined in 26 U.S.C. 3285, *supra*, (1) failed to pay the occupational tax of $50 per year as required by 26 U.S.C. 3290, *supra*, and (2) failed to register with the collector of his district as required by 26 U.S.C. 3291, *supra*, in violation of 26 U.S.C. 2707(b), and 3294, *supra*.

The defendant moved to dismiss the information on the ground that the statute on which it is based is unconstitutional in that it constitutes a penalty in the guise of a tax; that is arbitrary and unreasonable; that it attempts to regulate an activity which is entirely within the jurisdiction of the state; that it imposes a tax which is not uniform, in that certain persons are excluded from its operation; and, finally, that it compels a person to be a witness against himself. In its opinion granting defendant's motion to dismiss (Appendix, *infra*), the District Court conceded "that the revenue objective of the legislation in question is clearly within the scope of the powers of Congress to

express," that "it imposes a tax deemed by the Congress fair and reasonable," and that it "exempts certain types of wagering and wagerers, which to Congress seemed wise, and requires certain information which appear to be constitutionally legitimate." The District Court held, however, that because the information called for by the registration provisions (26 U.S.C. 3291, *supra*) was "peculiarly applicable to the applicant from the standpoint of law enforcement and vice control", the entire legislation falls as an infringement by the federal government on the police power reserved to the states by the Tenth Amendment to the Constitution.

THE QUESTION IS SUBSTANTIAL

The District Court conceded that the revenue features of the statute were a valid exercise of the federal taxing power,[2] but held that the information called for by the registration provision (26 U.S.C. 3291, *supra*) was so manifestly designed to aid state law enforcement that the entire statute must be deemed an encroachment upon the reserved powers of the states.

It is not clear from the opinion whether the court considered the information required by the statute unrelated to the taxing power, or whether it intended to hold that, even though the information was pertinent to enforcement of the tax, the regulatory effect of the statute nevertheless rendered it unconstitutional. On either interpretation, the decision is clearly erroneous.

The statute in all its aspects is a proper exercise of

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[2] As the opinion of the court below concedes the validity of the special tax provision (26 U.S.C. 3290), the violation of which is charged in the first count of the information, it is not clear why that count was dismissed. The opinion below rested solely on the invalidity of the registration provisions (26 U.S.C. 3291), the breach of which is the foundation of the second count.

the taxing power. It fixes a reasonable tax on a lucrative business. The registration provisions merely require the person engaged in such business to specify his place or places of business and to specify, either the persons who carry on the business for him, or the persons for whom he carries on the business. Manifestly, such information is relevant and useful in the enforcement and administration of the tax.

These considerations, apparent from the face of the legislation, are reinforced by its legislative history. The occupational tax provisions of the Revenue Act of 1951 are in part the fruit of exhaustive inquiry into gambling by the Special Senate Committee to Investigate Organized Crime in Interstate Commerce acting pursuant to legislative mandate. S. Res. 202, 81st Cong. That committee found that organized gambling is a business that operates through a large interstate network of syndicates which employ interstate channels of communications as their medium. S. Rep. 2370, 81st Cong., 2d sess.; S. Rep. 141, 307, 725, 82nd Cong., 1st sess. It found that twenty billion dollars changes hands every year in the United States as a result of organized gambling (S. Rep. p. 141, 82nd Cong., 1st sess., pp. 13-14), and that the United States Treasury is being defrauded of perhaps hundreds of millions of dollars in revenues by those operating this business. It further found that gamblers customarily fail to keep books and records, and that it is extremely difficult, if not impossible, for the Government to establish through any bookkeeping methods, their real income (S. Rep. 141, pp. 31-33, S. Rep. No. 307, 82nd Cong., 1st sess., pp. 4, 9). Against this background of legislative fact-finding, the Committee on Finance of the Senate, and the Committee on Ways and Means of the House of Representatives promulgated as part of the Revenue Act of 1951, the various provisions relating to taxation of gambling. Both committee reports make

it abundantly clear that a paramount consideration in enacting these wagering tax provisions was to obtain revenue (H. Rep. 586, p. 60; S. Rep. 781, p. 118, 82nd Cong., 1st sess.). In regard to the registration provision, both reports emphasize that "enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved. For this reason, the bills provide that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers" (*Ibid.*). Both committee reports estimate that the wagering taxes will yield $400 million dollars per year in revenue (H. Rep. 586, *supra*, p. 54; S. Rep. 781, *supra*, p. 112).

In the light of such explicit congressional expression as to the purpose of the occupational tax provisions, it is clear that Congress has acted in the exercise of its taxing power. This Court has held that the reasonableness of the means employed to effectuate this legitimate function is solely for Congress to determine. *United States* v. *Doremus*, 249 U.S. 86, 89; *McCray* v. *United States*, 195 U.S. 27, 59; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421. Since, here, the tax on wagering was properly found by the District Court to be an exercise of the constitutional taxing power, the District Court was not warranted in substituting its judgment for that of Congress as to the pertinency to the act's requirement of the information called for by the registration provision (26 U.S.C. 3291, *supra*).

As noted above, Congress had ample basis for its conclusion that the required information is pertinent and essential to the enforcement of the taxes on wagering. Registration provisions have been held to be valid and necessary concomitants of other tax mea-

sures. *Nigro* v. *United States*, 276 U.S. 332. See also *Sonzinsky* v. *United States*, 300 U.S. 506, where this Court observed that the registration provisions of the National Firearms Act of 1934, Sec. 2, c. 757, 48 Stat. 1236, "are obviously supportable as in aid of a revenue purpose," p. 513.

In view of the fact that the registration provisions are a proper incident to a valid tax, the fact that they may also have a regulatory effect is constitutionally irrelevant. A taxing act does not fall because it has regulatory features touching activities which Congress could not otherwise regulate. This Court has repeatedly upheld tax provisions having a collateral regulatory purpose and effect.[3] It has upheld the constitutionality of other closely analogous taxes (and concomitant administrative and regulatory provisions in aid thereof) levied on the business of conducting lotteries, the sale of liquor, the sale of firearms and the transfer of narcotic drugs.[4]

United States v. *Constantine*, 296 U. S. 287, upon which the opinion below relies, is clearly distinguishable. There this Court held invalid a provision of the

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[3] *United States* v. *Sanchez*, 340 U.S. 42, 44-45; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585; *Sonzinsky* v. *United States*, 300 U.S. 506; *Magnano* v. *Hamilton*, 292 U.S. 40; *Hampton & Co.* v. *United States*, 276 U.S. 394, 412; *Nigro* v. *United States*, *supra*; *United States* v. *One Ford Coupe*, 272 U.S. 321, 328.

[4] *United States* v. *Sanchez*, *supra* (Marihuana Tax Act); *Sonzinsky* v. *United States*, *supra* (license tax on dealers in firearms). *Alston* v. *United States* 274 U.S. 289 (Harrison Narcotic Drug Act); *United States* v. *One Ford Coupe supra* (tax on intoxicating liquor and forfeiture provisions in connection therewith); *United States* v. *Doremus*, *supra* (Harrison Narcotic Drug Act); *License Tax Cases*, 72 U.S. 462 (special taxes on those engaged in certain trades, including those of selling lottery tickets and retail dealing in liquor).

Revenue Act of 1926, which imposed, in addition to a $25.00 excise tax laid on all retail liquor dealers, an added "special excise tax" of $1,000 on such dealers who carried on the business contrary to local law. This Court held that such tax was clearly a penalty since it was conditioned solely on violation of state law, and was "grossly disproportionate to the amount of the normal tax." 269 U.S. at p. 295. This Court in that case clearly sanctioned occupational taxes which "look only to the fact of the exercise of the occupation or calling taxed, regardless of whether such exercise is permitted or prohibited by the laws of the United States or by those of a State." *Ibid.* at p. 293. The moderate levy of $50.00 here involved is not conditioned on the violation of state law, but rests alike on all persons within the occupational category, regardless of whether the taxed activities or occupation are legal or illegal. It is not a cumulative tax "grossly disproportionate" to the amount of a normal tax. It thus has none of the indicia of a penalty in the guise of a revenue provision, which this Court found present in the *Constantine* case.

A three-judge court recently observed that the wagering tax provisions are constitutional, although it based its refusal to enjoin their enforcement on equitable principles. *Combs* v. *Snyder*, 101 F. Supp. 531 (D.C.D.C.), summarily affirmed by this Court 342 U.S. 939. Two recent federal district courts have upheld the constitutionality of the tax against contentions that such provisions constitute an infringement on the police power reserved to the states and on the privilege against self-incrimination. *United States* v. *Forrester*, No. 19,290 (N.D. Ga.), Feb. 29, 1952 (not reported); *United State* v. *James W. Penn*, No. 2021 (Mid D.N.C.), May 1952 (not reported).

It is submitted that the decision of the District Court in the instant case is erroneous and that the

question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted.

/s/ PHILIP B. PERLMAN,
Philip B. Perlman
Solicitor General.

MAY 1952.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 16672

Filed May 6, 1952

UNITED STATES OF AMERICA

v.

JOSEPH KAHRIGER

Sur Motion to Dismiss the Information

WELSH, J. May 6, 1952

The defendant, Joseph Kahriger, was proceeded against criminally by Information filed on March 17, 1952. The Information alleged that the defendant was in the business of accepting wagers and that he willfully failed to register for and pay the occupational tax as required by the Act of October 20, 1951, C. 521, Title IV, Sec. 471(a), 65 Stat. 529, 26 U.S.C., Sec. 3290 and 3291. The defendant has filed a Motion to Dismiss the Information on the ground that the law is unconstitutional for various reasons set forth in his briefs. The question presents many features in connection with taxation that have been the subject of dispute and decisions for the Appellate Courts of the land. At the outset, we decide to recognize the principle that the power of the Congress of the United States to levy taxes is and should be free from judicial control unless

the fundamentals of the Constitution of the United States are violated. We recognize the exculsive power of the Congress in the field of legislative enactment, and we recognize it as the only vehicle to express the judgment of our people on the delicate matter of finance. We also are scrupulously meticulous in confining to the Judiciary their peculiar and limited responsibilities in interpreting such legislation. This concept of the judiciary however, requires a recognition of the fact that while the judiciary can express no opinion as to the wisdom of tax legislation or any motives that might have prompted such legislation, the Judiciary has the sacred responsibility of guarding the people against invasion of constitutional rights and protecting the States from an invasion of their Sovereign rights under the guise of taxation when the constitutional safeguards are endangered.

A careful consideration of the cases cited in the briefs submitted by both sides convinces this Court that the subject matter of this legislation so far as revenue purposes is concerned is within the scope of Federal authorities. In other words it is quite clear that the revenue objective of the legislation in question is clearly within the scope of the powers of Congress to express. We desire to say that at the outset, because if there was nothing more to the case than the question of vagueness of the tax, and the discriminatory nature of the tax, the defendant's position would be untenable. But the legislation goes much further than a piece of taxing legislation. It imposes a tax deemed by the Congress fair and reasonable, exempts certain types of wagering and wagerors, which to Congress seemed wise, and requires certain information which appear to be constitutionally legitimate. This we think, fairly summarizes the revenue and taxing features of the legislation. If it stopped there the legislation would undoubtedly be sound, but it does not stop there.

When the Act departed from the field of taxable legislation and went into the field of morals and invaded the sanctuary of State control it then became and now is the subject of judicial inspection. In the remarks that we feel constrained to make on this measure we feel it our duty, due to the critical conditions prevailing in our social life of today, to say that we recognize the high purposes of the Congress to curb a present and growing evil. A person would indeed be blind today if he were not to recognize that the great increase in gambling and forms of related vice has reached a stage that unless controlled or curtailed will undermine the very pillars of our social order and sap the very lifeblood of our National body. We are convinced from our long contact with the Congress and its members that they must have been appalled by the conditions existing, especially in our big cities, by the revelations of their own congressional investigations.

Now, notwithstanding the laudable and even holy purposes to curb this growing evil, had they the right under the guise of a taxing power to also require that certain information be furnished which is peculiarly applicable to the applicant from the standpoint of law enforcement and vice control? The applicant for registration among many things is required to give the names of other persons, both real and alias, or style, with address of business and residence. Failure to give this information and to comply with the law in certain respects would subject the applicant to a fine of ten thousand dollars ($10,000) and an imprisonment of five (5) years. This feature of the legislation is presented to throw light on the question as to whether this portion of the measure is a tax bill or a police measure. Is the purpose of the Act and delegation of bureaucratic powers to create revenue or to constitute a host of informers?

In addressing ourselves to the above question we found it necessary to consult the many decisions submitted to us by the parties and those suggested by our own research. A review of the cases serves to throw light upon the progressive character of our revenue laws and reveals the influence brought upon the Congress and the Courts by the economic conditions of the various periods of our development. They clearly show, as in the case of the Firearms Act and the legislation on oleomargarine, and various excise taxes, the impingement of industrial and economic pressure. It would be unwise to give any particular case as a complete authority on the subject without considering the background of each particular case. As we have said, the history of the Act involved in this case has been progressive. But it seems to us that the case which most clearly reveals the silver thread of truth as contained in the decisions is to be found in the case of United States v. Constantine, 296 U.S. 287, decided by the United States Supreme Court on December 9, 1935. That case was one wherein the Federal Government levied what the Court declared to be a valid federal excise tax on retail liquor dealers. The excise tax was twenty-five dollars ($25.00) but the amended Act imposed a special excise tax of one thousand dollars ($1,000) on such dealers when they carry on the business contrary to local, state or municipal laws and provided a *fine* and *imprisonment* for failure to pay. (It will be observed that the 18th Amendment to the Constitution was then in force)

We quote, in part, from the opinion of Mr. Justice Roberts in the above case, United States v. Constantine, as follows:

> "In the acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax and a special tax. If in reality a penalty it cannot be converted into a tax by so

naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name. Disregarding the designation of the exaction, and viewing its substance and application, we hold that it is a penalty for the violation of state law, and as such beyond the limits of federal power."

"The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue. Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct."

"We conclude that the indicia which the section exhibits of an intent to prohibit and to punish violations of state law as such are too strong to be disregarded, remove all semblance of a revenue act, and stamp the sum it exacts as a penalty. In this view the statute is a clear invasion of the police power, inherent in the States, reserved from the grant of powers to the federal government by the Constitution."

"We think the suggestion has never been made—certainly never entertained by this Court— that the United States may impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications from a decision sustaining such an imposition would be startling. *The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority.* The regulation of the conduct of its

own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens speaking through their representatives."

"Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a state law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. *They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State.*" (Italics supplied)

No language that we could use would more clearly or more forcefully express the law of the land on this subject. In addition to its being the pronouncement of the Supreme Court of the land on the principle involved, and by which we are bound, we find ourselves in full accord with it, both in letter and in spirit. Today, the simplicity of our former way of life has largely disappeared. Our economic enterprises are myriad. While the desire to curb the underworld activities is a wholesome tribute to our fundamental aspirations, if the fundamental principles claimed by the federal government in this particular case were given the highest Judicial approval, future acts of Government in a field not so free from improper motives, would enable the Central Government to regulate our lives from the cradle to the grave. The remedy would be far worse than the disease.

The Motion to Dismiss is granted.

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